INDEX

CITATIONS

495735—42——1

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 489

AREFF SAMARA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (R. 26–27) is reported in 39 F. Supp. 880. The opinion of the circuit court of appeals (R. 32–37) is reported in 129 F. (2d) 594.

JURISDICTION

The judgment of the circuit court of appeals, following denial of petition for rehearing, was entered July 24, 1942 (R. 45). The petition for a writ of certiorari was filed October 24, 1942. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Petitioner filed a claim for refund of cotton compensating taxes paid under the Agricultural Adjustment Act of 1933. Except for his affidavit to that effect, the claim contained no evidence that the burden was not shifted. The Commissioner rejected the claim and petitioner instituted a suit for refund. The question is whether, in view of the requirements of Sections 902 and 903 of the Revenue Act of 1936, a motion to dismiss was well taken on either of two grounds:

A. That the court was without jurisdiction to entertain the action;

B. That the evidence properly before the court was insufficient to establish that petitioner bore the burden of the tax.

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved are set forth in the Appendix, *infra,* pp. 16–23.

STATEMENT

In the period August 1, 1933, to January 6, 1936, petitioner paid cotton compensating taxes totalling $264.91, which were imposed pursuant to the Agricultural Adjustment Act of 1933, declared unconstitutional in *United States* v. *Butler,* 297 U. S. 1. Asserting his right to relief under the provisions of Title VII of the Revenue Act of 1936, petitioner filed a timely claim for refund of these taxes on the prescribed form. The instructions

accompanying the form required the claimant to set forth in the appended Schedule D the "facts and evidence, together with exhibits and other data showing the amount of the burden of the tax borne by the claimant and not shifted to other persons." (R. 11.)

Petitioner did not set forth any facts or evidence in Schedule D but left it blank (R. 9). He attached to the schedule copies of customs entries showing importation of the goods involved (R. 13, 15, 17), and Schedule F in which he "contended" that the burden of the tax was borne by him and not shifted to other persons directly or indirectly (R. 9). A statement to like effect, and substantially in the words of Section 902 of the statute, appeared also in the body of the claim (R. 7). Schedule A (R. 8) and the supplement thereto (R. 12) disclosed payment to the Collector of Customs of the amounts claimed in the suit for refund.

The refund claim, in affidavit form, was duly signed and subscribed (R. 7). Except as stated above, it contained no facts or evidence identifying petitioner as the bearer of all or any part of the tax burden.

The Commissioner notified petitioner by letter that the claim did not contain sufficient evidence to establish, as the statute required, that he bore the burden of the tax and did not shift it. The letter suggested several kinds of evidence which he might furnish, and he was given thirty days to comply.

(R. 22–23.) Approximately two months thereafter, the Commissioner notified petitioner that if the requested evidence of "non-shift" was not submitted within thirty days from the date of this second letter, the claim would be adjusted on the basis of the evidence on file (R. 24). Petitioner made no response to these letters (R. 25). Subsequently, the Commissioner rejected the claim on the ground that evidence sufficient to establish that petitioner bore the burden of the tax had not been submitted; the rejection notice stated that "Therefore * * * the Commissioner is without authority to favorably consider your claim" (R. 25).

The district court granted the Government's motion to dismiss petitioner's complaint for want of jurisdiction since the claim did not meet the "statutory requirement" of Section 903 (R. 27). The circuit court of appeals, treating the motion to dismiss as one for summary judgment, held that grounds and facts on which the Commissioner had no opportunity to pass could not be adduced upon trial, and that the evidence properly before the court failed to spell out a case for relief (R. 32–37). The case was remanded for dismissal on the merits (R. 45).

ARGUMENT

Whether based on lack of jurisdiction to entertain the suit or on insufficiency of admissible evidence to prove the case, dismissal of petitioner's

refund action was correct. Since settled authority is in accord, further review by this Court is unnecessary.

Congress expressly limited refunds of amounts collected under the Agricultural Adjustment Act to taxpayers who establish that they bore the burden of such amounts, have not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly. Section 902 of the Revenue Act of 1936 (Appendix, *infra*).

By further provision, refund is to be disallowed unless the taxpayer has filed a claim in accordance with regulations prescribed by the Commissioner with the approval of the Secretary of the Treasury, and all evidence relied upon in support of such claim is required to be clearly set forth under oath. Section 903 of the Revenue Act of 1936 (Appendix, *infra*). If the Commissioner fails to act on the claim or rejects it, the claimant can resort to the courts or to the Board of Review which the Act created. Sections 904 and 905 of the Revenue Act of 1936. See also Section 906.

1. To invoke the jurisdiction of the district court, petitioner was required to show not only that he filed a timely claim which was rejected, but that the claim which he filed answered the requirements of the statute. Conditions to suit against the sovereign must be strictly met. *United States* v. *Felt & Tarrant Co.*, 283 U. S. 269; *Dascomb* v. *McCuen*, 73 F. (2d) 417 (C. C. A. 2d), certiorari denied *sub*

nom. Chandler v. *McCuen,* 295 U. S. 737; *Biermann* v. *Shea,* 28 F. Supp. 213 (S. D. N. Y.). Compliance in the case at bar was *de minimis,* if there was any compliance at all.

"All evidence relied upon" (sec. 903) in support of this claim, as set forth on the prescribed form, consisted merely of a broad general assertion by the claimant that the tax had not been shifted. A self-serving declaration in such terms is not evidence; it is at best an ultimate fact, if not a conclusion of law. See *Lee Wilson & Co.* v. *Commissioner,* 111 F. (2d) 313, 123 F. (2d) 232 (C. C. A. 8th); *Landrum* v. *Commissioner,* 122 F. (2d) 857 (C. C. A. 8th); *Tennessee Consolidated C. Co.* v. *Commissioner,* 117 F. (2d) 452 (C. C. A. 6th); *Morristown Knitting Mills, Inc.* v. *United States,* 42 F. Supp. 817 (C. Cls.). And it gains nothing by being made under oath.[1]

[1] It clearly appears from the legislative history of Sections 902 and 903 that Congress intended that these claims should be substantiated by detailed facts, records, and schedules rather than unsupported affidavits. Where, as in Section 602 (b) of the same Act, Congress intended to permit the Commissioner to base his action on claims substantiated by affidavits rather than detailed schedules and records, a specific amendment was enacted for that purpose. Eighty Cong. Record, 8660. See also Senate Finance Committee Report, S. Rep. No. 2156, 74th Cong., 2d sess., p. 29 (1939–1 Cum. Bull. (Part 2) 678). However, with respect to the changes made in Section 21 (d) of the Agricultural Adjustment Act, as amended by Section 903 of the Revenue Act of 1936, the Senate Finance Committee said (p. 34):

"* * * While a great many claims for refund have been

The customs entries were attached, and evidence [2] that the claimant had paid the tax was also included in the claim (see Statement, *supra*, p. 3). But since the statute limits reimbursement to the person who ultimately bore the tax,[3] there is scant probative value in evidence of initial payment.

Petitioner was required under the terms of the statute (secs. 902–903) to set forth affirmatively the evidence of "non-shift" on which he relied. And if, as the district court found (R. 27), the claim contained no evidence to substantiate the assertion

---

filed under section 21 (d), the great majority of such claims do not set forth the *evidence* relied upon in support of such claims. * * * It is, therefore, necessary that new claims be filed so that each claimant's right to secure a refund may be established in accordance with the procedure set forth under Title VII * * *." [Italics supplied.]

[2] The circuit court of appeals regarded this and the claimant's affidavit as some supporting evidence, sufficient at least to confer jurisdiction on the district court after the Commissioner's rejection of the claim (R. 35).

[3] At the time of the original enactment of the Agricultural Adjustment Act under which this tax was collected, Congress assumed that the economic burden of the taxes would be shifted to the consumer in domestic markets. See H. Rep. No. 6, 73rd Cong., 1st sess., pp. 6–7, Protection of Consumers; H. Rep. No. 1241, 74th Cong., 1st sess., pp. 2–3, 20, Declaration of Policy—Consumer's Interest; 79 Cong. Rec. 9560. The subsequent history of the Agricultural Adjustment Act demonstrates that the assumption was well founded. See An Analysis of the Effect of the Processing Taxes Levied under the Agricultural Adjustment Act, U. S. Treasury Department (1937). It was in the light of this situation that Congress enacted the refund provisions of Title VII of the Revenue Act of 1936. See *Cudahy Packing Co.* v. *Harrison*, 18 F. Supp. 250 (N. D. Ill.).

495735—42——2

that he bore the burden, petitioner could have no standing in court.[4] *Lee Wilson & Co.* v. *Commissioner,* 111 F. (2d) 313, 123 F. (2d) 232 (C. C. A. 8th); *Landrum* v. *Commissioner,* 122 F. (2d) 857 (C. C. A. 8th); *Tennessee Consolidated C. Co.* v. *Commissioner,* 117 F. (2d) 452 (C. C. A. 6th); *Solomon* v. *United States,* 57 F. (2d) 150 (C. C. A. 2d); *Morristown Knitting Mills, Inc.* v. *United States,* 42 F. Supp. 817 (C. Cls.).

Moreover, the regulations (Art. 202, Appendix, *infra*) prescribed under congressional authority (sec. 903, Appendix, *infra*) required substantiation of all the facts necessary to establish the claim to the satisfaction of the Commissioner.[5] Yet prior to trial, petitioner furnished no evidence that he bore the tax burden beyond that, if any, which the claim itself contained, although he had been twice

[4] If the fact of exaction of the illegal tax and petitioner's unsubstantiated assertion that he did not shift the burden were all the evidence "relied on" (sec. 903) by him in support of the claim, certainly the "reliance" was totally unwarranted. It is not contended that all available evidence must be presented to the Commissioner before the taxpayer can come into court. But surely in its elaborate provision for action by the Commissioner on refund claims, Congress did not intend him to be by-passed simply by the taxpayer's pre-trial "reliance" on evidence showing nothing which would warrant relief. The words of the statute (sec. 903) are "*All* evidence relied upon *in support of such claim* shall be clearly set forth under oath." [Italics supplied.]

[5] Of course, "to the satisfaction of the Commissioner" (sec. 902) is a phrase of admonition and means only that "non-shift" will not lightly be inferred. See *United States* v. *Jefferson Electric Co.*, 291 U. S. 386.

notified by the Commissioner that the claim did not suffice. Observation of the regulations was likewise a jurisdictional requirement, even though it could be waived. See *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62; *Bonwit Teller & Co.* v. *United States*, 283 U. S. 258; *Tucker* v. *Alexander*, 275 U. S. 228; *Biermann* v. *Shea*, 28 F. Supp. 213 (S. D. N. Y.).

The Commissioner was entitled, however, to insist that the defects in the claim be cured (*Lee Wilson & Co.* v. *Commissioner*, 111 F. (2d) 313, 123 F. (2d) 232 (C. C. A. 8th)); and if his conduct was consistent with insistence that the regulations be observed,[6] the taxpayer could not come into court

[6] The Commissioner gave notice (R. 24) that if the requested evidence was not submitted, he would "proceed with the adjustment of the claim on the basis of the evidence on file." If no supporting evidence was contained in the claim, as the district court found (R. 27), or otherwise furnished to the Commissioner, as is undisputed, this notice would seem to be a declaration that, unless amended or supplemented, the claim would be rejected as defective because unsubstantiated by facts.

Further, petitioner was informed in the rejection letter (R. 25) that because of his noncompliance with Section 903 and Regulations 96, the Commissioner was "without authority" to consider the claim favorably. No amendment to the claim was filed.

It is to be noted, too, that there was no evidence of a conference between the Commissioner and petitioner (cf. *Bethlehem Baking Co.* v. *United States*, 40 F. Supp. 936 (E. D. Pa.)); the Commissioner had held no hearings on the facts or the law (cf. *Cudahy Packing Co.* v. *Harrison*, 18 F. Supp. 250 (N. D. Ill.)); and the Government did not answer plaintiff's complaint upon the merits (cf.

without having complied. *Bullock's, Inc.* v. *United States,* 43 F. Supp. 861 (S. D. Cal.). See also *United States* v. *Memphis Cotton Oil Co.,* 288 U. S. 62; *Biermann* v. *Shea,* 28 F. Supp. 213 (S. D. N. Y.). Implicit in the decision of the district court was its view that there was no waiver [7] (see R. 27).

2. If we assume, however, that the claim sufficed to give the district court jurisdiction of the action, petitioner still had to prove his case. He could not do so unless the evidence essential to recovery was admissible at the trial although he had not previously furnished the Commissioner with any facts which would substantiate his claim.

The manifest purpose of statutory provisions of this character is to ensure administrative adjustment of claims wherever possible. This purpose would be completely defeated if a taxpayer could advance one ground for relief to the Commissioner and another to the court. It is well settled that he cannot do so. *United States* v. *Felt & Tarrant Co.,* 283 U. S. 269; *United States* v. *Piedmont Mfg. Co.,* 89 F. (2d) 296 (C. C. A. 4th); *Weagant* v. *Bowers,* 57 F. (2d) 679 (C. C. A. 2d). And "grounds" and

---

Bethlehem Baking Co. v. *United States,* 129 F. (2d) 490 (C. C. A. 3d)) but moved for its dismissal for lack of jurisdiction (see R. 5, 26).

[7] The court below was of the opinion that the Commissioner had not insisted on compliance with the regulations, but had considered and rejected the claim on its merits, thereby waiving any irregularity in form (R. 35). *Bethlehem Baking Co.* v. *United States, supra; Cudahy Packing Co.* v. *Harrison,* 18 F. Supp. 250 (N. D. Ill.).

"facts" are one and the same where, as here, the claimant's rights rest entirely on complex factual questions.[8] The same principle of law is therefore applicable. See *Dascomb* v. *McCuen,* 73 F. (2d) 417 (C. C. A. 2d), certiorari denied *sub nom. Chandler* v. *McCuen,* 295 U. S. 737; *Snead* v. *Elmore,* 59 F. (2d) 312 (C. C. A. 5th).

The court below did not hold, as petitioner assumes throughout his brief, that no evidence which has not been submitted to the Commissioner may be introduced at the trial. The claimant may corroborate, elaborate, and supplement; this the court made clear (R. 37). But he may not present facts at the trial which materially differ from those he disclosed to the Commissioner, nor may he entirely circumvent the intended administrative procedure by filing a purely formal claim without any disclosure.[9] As the court below said (R. 37), "There

[8] See Section 907, Appendix, *infra*, establishing a method for determining the extent of shift by comparison of "average margin" during the tax period with "average margin" for the period before and after the tax period, "average margin" being calculated from the individual taxpayer's sales, tax, and cost data.

[9] Petitioner cites (Pet. 12) Section 914 which empowers the Commissioner to examine records, subpoena witnesses, take depositions, etc., as the means Congress established for the Commissioner to secure any information he may need to pass upon the merits of the claim. Obviously this section is merely to aid the Commissioner's investigation of the substantiation which the taxpayer is required to supply.

Petitioner also calls attention to Section 906 (g) (Pet. 11–12) allowing additional evidence to be adduced under certain conditions even after a circuit court of appeals has assumed jurisdiction to review a decision of the statutory

is certainly no hardship in applying such rule in the case at bar, for the plaintiff was repeatedly warned by the Commissioner's letters."

There is no conflict among the circuits that this is the law. Indeed, the authorities uniformly recognize the principle which the court below applied. See cases cited, *supra,* pp. 10–11. The cases taxpayer cites (Pet. 3, 9–10) as holding to the contrary do not present situations where the claim contained no substantiating evidence and none was furnished prior to trial.

Thus in *Bethlehem Baking Co.* v. *United States,* 129 F. (2d) 490 (C. C. A. 3d), the taxpayer and Commissioner held an informal conference at which the entire case was reviewed. The taxpayer had previously submitted an analysis of its costs. The Third Circuit expressly recognized a duty in the claimant to endeavor by sufficient proof to satisfy the Commissioner of the merits of the claim.

In *Bullock's, Inc.* v. *United States,* 43 F. Supp. 861 (S. D. Cal.), the court distinguished the case

---

Board of Review. However, the conditions are that the applicant for leave to furnish such evidence must show to the satisfaction of the court not only that such additional evidence is material, but that there were reasonable grounds for failure to adduce such evidence in the hearing before the presiding officer of the Board of Review. If this provision furnishes a basis for argument that the trial court may hear additional evidence upon which the Commissioner has had no opportunity to pass, it would seem that a similar showing of reasonable grounds for failure to submit it to him should at least be made. See *Ney* v. *United States,* 33 F. Supp. 554 (W. D. Va.).

before it from this very case in these words (p. 862):

> In the Samara case, Judge Knox [Coxe] of the Southern District of New York, found that the claim as presented * * * failed *utterly* to comply with the statute. * * * "it [the claim] merely contained a broad, general assertion * * * *without evidence of any kind* to substantiate the assertion. * * *" [Italics supplied.]

And quoted with approval in the *Bullock's* case was this language from the opinion in *Hutzler Bros. Co.* v. *United States,* 33 F. Supp. 801 (Md.), a decision which petitioner also urges is in conflict (p. 803):

> * * * it is not intended that a claimant *who produces before the Commissioner certain evidence* is forever thereafter barred from introducing *further* evidence in resorting to a court proceeding for refund, * * *. [Italics supplied.]

Ney v. *United States,* 33 F. Supp. 554 (W. D. Va.), is another case in which it appeared that the claimant made a pre-trial disclosure of all the facts on which he relied. He submitted to the Commissioner affidavits of various persons connected with the business, each of which contained statements negativing any increase in sales price during the tax period; and at the trial he merely offered the affiants as witnesses to amplify their statements previously made. The court specifically noted that

there was no disinclination on the part of the taxpayer to furnish all the evidence he could.

It is not possible to determine from the opinion in *London Weatherproofs, Inc.* v. *United States,* 40 F. Supp. 977 (E. D. N. Y.), what evidence, if any, the claim there contained. But since the court in that case relied on the *Hutzler* and *Ney* decisions, in both of which the claimant had supplied substantiation, the case cannot be an authority contrary to the position of the court below.

Neither is *Fidelity & Columbia Trust Co.* v. *Lucas,* 7 F. (2d) 146 (W. D. Ky.), cited by petitioner (Pet. 4), a conflicting decision. In that case the Collector was urging that the court was powerless to give the taxpayer relief unless it should find that in assessing the tax, the Commissioner acted fraudulently or arbitrarily in passing on the facts or was clearly mistaken as to the law; and that the court, in so determining, could look only to the evidence which was before the Commissioner at the time he passed on the refund application.

Finally, the excerpt quoted (Pet. 6–7) from *Snead* v. *Elmore,* 59 F. (2d) 312 (C. C. A. 5th), not only fails to support petitioner's contention of error here but effectively shows that there was none.[10]

---

[10] The excerpt reads in part (p. 314):

"* * * The purpose [of the requirement that all the facts relied upon in support of the claim must be clearly set forth under oath] is to enable the claimed errors to be corrected by the Commissioner and suits to be minimized, *and*

CONCLUSION

The decision below is sound, whether rested on jurisdictional or substantive grounds. There is no conflict of decisions. Accordingly, the petition for certiorari should be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

SAMUEL O. CLARK, JR.,
Assistant Attorney General.

SEWALL KEY,
MARYHELEN WIGLE,
Special Assistants to the Attorney General.

WALTER J. CUMMINGS, JR.,
Attorney.

NOVEMBER 1942.

---

if disagreement persists to limit the litigation to the matters which have been so re-examined and in reference to which the tax officers are fully prepared to defend the issue. * * * This does not mean that the claim for refund must have contained all the evidence or argument that is offered in the suit, but it must have indicated * * * *the substantial grounds on which illegality is asserted and the general facts supporting the grounds, so that they may be fully investigated.* * * *" [Italics supplied.]